BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule	)))	MB Docket No. 17-318
	)	

<u>COMMENTS OF DISH NETWORK L.L.C.</u>

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DISH Network L.L.C. ("DISH") submits these comments in response to the above-captioned Notice of Proposed Rulemaking ("*NPRM*") seeking comment on whether the Commission should, and may, modify the national TV station audience reach cap (the "National Cap") and the associated UHF discount.[1] The Commission should leave the National Cap unchanged, and should eliminate the UHF discount. To do otherwise would only facilitate further broadcaster consolidation to the detriment of consumers, competition, and localism.

First, relaxing or eliminating the Congressionally-mandated National Cap would, among other things, hurt the public interest because it would further imbalance the playing field between broadcasters and distributors, leading to higher prices for consumers. The link between the size of the broadcast mega-group and the retransmission consent fee it charges is not a matter of academic speculation. DISH has undertaken a rigorous study of hundreds of its own retransmission agreements and concluded that: the larger the broadcaster, the higher the retransmission rate that broadcaster charges DISH; and, broadcast mergers lead to significant increases in retransmission rates above and beyond the retransmission increases that the industry

[1] Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, *Notice of Proposed Rulemaking*, MB Docket No. 17-318 (rel. Dec. 18, 2017) ("*NPRM*").

has evidenced during the last decade in the first place. As a result, distributors have little choice but to pass a portion of these increases through to customers.

Second, unlike the National Cap, the UHF discount is purely a creature of the Commission's own design. It was put in place to address a technical limitation of analog UHF transmissions that no longer exists. It would be improper for the Commission to do anything but eliminate it.

Finally, the FCC lacks the authority to modify the National Cap. Because it is a creature of statute, only Congress may change it.

I. THE FCC SHOULD MAINTAIN THE 39 PERCENT NATIONAL CAP

A. The cap is necessary to avoid negotiating imbalances between broadcasters and distributors.

The Commission first adopted a national audience reach cap to "preclude substantial network expansion" for broadcast stations "already hav[ing] significant population penetration" and "attenuate[] the alleged detrimental impact of network expansion."[2] When Congress enshrined the National Cap in statute, it did so to "prevent excessive consolidation in the broadcast market."[3] This market is just as at risk of over-consolidation today as it was when Congress set the cap at 39 percent in 2004. And, broadcasters continue to extract exorbitant retransmission consent fees even under the current cap.

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[2] Amendment of Section 73.3555 [formerly Sections 73.35, 73.240 and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, *Memorandum Opinion and Order*, 100 F.C.C.2d 74, 87-88 ¶ 31 (1985) ("*1985 Order*").

[3] Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, *Report and Order*, 31 FCC Rcd. 10213, 10224 ¶ 23 (2016) ("*UHF Discount Elimination Order*").

Raising or eliminating the cap to allow further consolidation would only increase the harm faced by consumers in the form of these rising retransmission consent fees.[4] According to SNL Kagan estimates, the average total retransmission fee per subscriber, per month (across all station owners) rose from $0.19 in 2006 to $6.79 in 2016.[5] The reason for this staggering increase is simple: the asymmetry of bargaining power between a network station and distributor in each local designated market area ("DMA"). There is typically only one affiliate for each of the four major broadcasting networks in each area. That station's distribution options include a cable system, two national satellite carriers, and often a telephone company, in addition to transmission over the air. So, while each network station has four or five options, each distributor, by contrast, has only one if it wants that network retransmitted to the distributor's subscribers in the area. The same imbalance is manifest in the event of a blackout. While a distributor is bleeding subscribers and associated revenues, its subscribers flee to competitive distributors; as a result, the network does not lose the same number of "eyeballs" as the distributor. In fact, the broadcaster has so much leverage that, when the blackout is over, it typically receives retroactive payment for each of the subscribers that stayed with the distributor.

[4] In 2014, the Commission cited projections that retransmission fees for 2016 would be $2.6 billion, more than 12 times those for 2006 – $214.6 million. *See* Amendment of the Commission's Rules Related to Retransmission Consent, *Report and Order*, 29 FCC Rcd. 3351, 3363 ¶ 16 n.68 (2014). In percentage terms, this is 1,200%. Additionally, retransmission fees have accounted for an increasing share of local station revenues; in 2006, prior to the widespread payment of retransmission fees, local broadcast stations were estimated to earn in excess of 95 percent of their revenue from advertising and one percent from retransmission fees. In 2016, advertising accounted for an estimated 69 percent of local station revenues while retransmission fees had increased to 24 percent of revenues. Declaration of Janusz A. Ordover ¶ 10 (Aug. 7, 2017) ("Ordover Sinclair-Tribune PTD Decl.") (attached as Exhibit D to Petition to Dismiss or Deny of DISH Network, L.L.C., MB Docket No. 17-179 (Aug. 7, 2017) ("DISH Sinclair-Tribune PTD")).

[5] SNL Kagan (2017), Broadcast retransmission and virtual service provider carriage fee projections through 2023, in "The Economics of Broadcast TV Retransmission Revenue."

But the distributor never recovers the subscription revenues from customers who left during the blackout, and always loses a portion of those customers and their revenues for good.[6]

Raising the National Cap, or eliminating it entirely, will add explosive fuel to that fire. Large broadcast groups have even greater bargaining power than small ones. Broadcast group size, and further broadcast group consolidation, would exacerbate that asymmetry and raise prices much further and much faster.

These already-high prices are the product of a decade of increasing broadcast industry consolidation. In 2005, the five largest owners of local stations owned 179 full power television stations; in 2016, the five largest companies owned 443 stations.[7] Further, as shown in the following charts, each of the four largest groups in 2017 has more stations than the largest group did in 2008:

Top 10 Broadcast Groups 2008[8]

Broadcast Group	Number of Full Power Stations
ION	55
Sinclair	48
Univision	37
Raycom	36
Gray	31
Hearst	29
Nexstar	29
Trinity	24
LIN	24
Newport	24
Tribune	23

[6] Declaration of Melissa Ordonez ¶ 13 (Aug. 7, 2017) ("Ordonez Sinclair-Tribune PTD Decl.") (attached as Exhibit C to DISH Sinclair-Tribune PTD").

[7] DISH Sinclair-Tribune PTD at 4.

[8] Derived from SNL Kagan, *Top Commercial TV Station Groups* (Jan. 2, 2009).

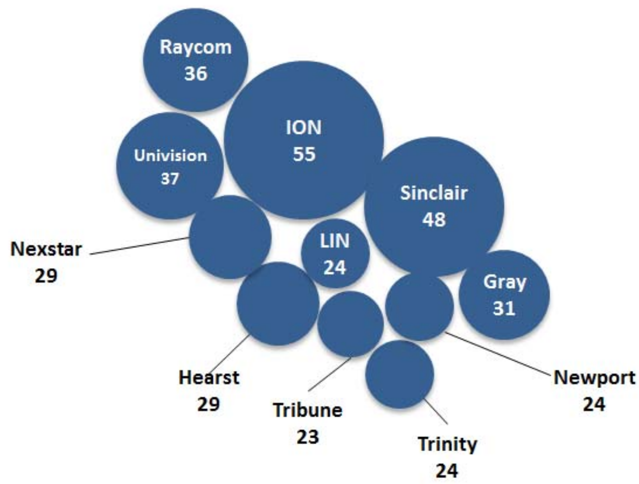
Top 10 Broadcast Groups 2017 (showing in parentheses the groups acquired)[9]

Broadcast Group	Number of Full Power Stations	Number of Full Power Stations if Sinclair-Tribune Transaction is Consummated
Nexstar (Media General, LIN Media, Young)	130	130
Sinclair (Allbritton, Fisher, Bonten, Barrington)	118	159
Gray (Shurz, Hoak Media, Parker)	75	75
ION	60	60
Raycom (Drewry)	47	47
TEGNA/Gannett (Belo)	45	45
Tribune (Local TV)	41	0
Univision	38	38
Hearst	32	32
Scripps (Journal)	27	27

Here is a graphic demonstration:

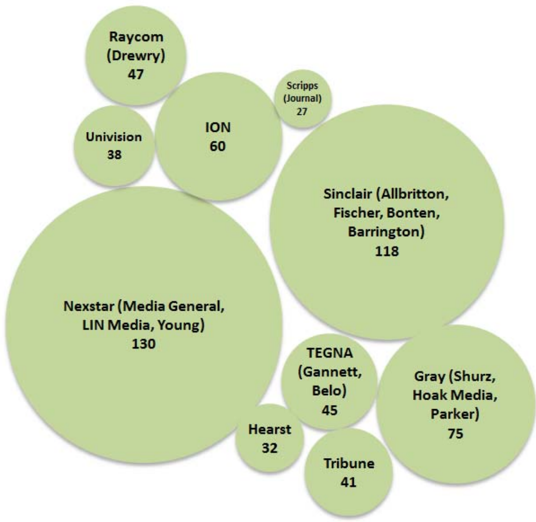
The Big Bang of Broadcast Industry Consolidation

2008

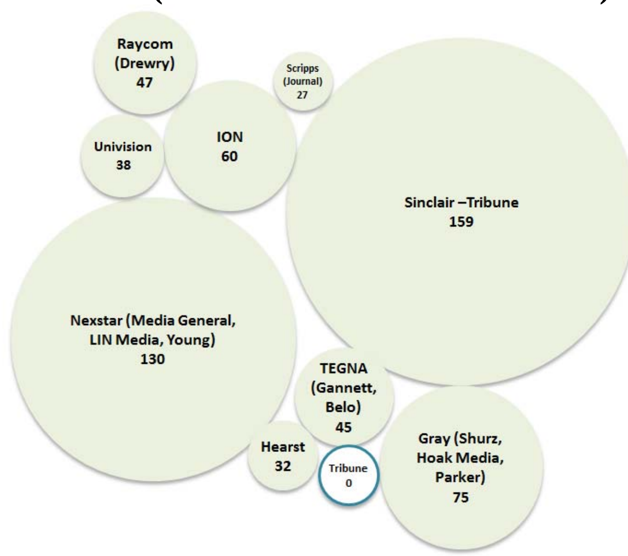


[9] Derived from SNL Kagan, *Top Commercial TV Station Groups* (Jan. 26, 2017).

2017



2017 (with Sinclair Tribune combined)



This increasing consolidation has already taken its toll in the form of higher prices. To analyze this phenomenon, DISH commissioned a rigorous statistical examination of the prices it pays under its agreements with as many as 43 broadcast groups. The analysis, conducted by Professor Janusz Ordover, William Zarakas, and Dr. Jeremy Verlinda, reached a sobering, statistically-significant conclusion: "[o]ther things being equal, the larger the broadcast station group, the higher the retransmission fee paid by the MVPD."[10] This outcome is irrespective of whether the broadcast group size is measured by combined local broadcast station revenues or the number of DISH subscribers reached.[11] Analysis of data at the local level further supports this conclusion. In 48 of the 57 DMAs where there is both at least one large broadcaster (reaching a million DISH subscribers or more) and at least one small one (reaching fewer than a million DISH subscribers), the rate charged by the largest broadcaster is the highest in the

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[10] DISH Sinclair-Tribune PTD at 3.

[11] Declaration of William P. Zarakas and Jeremy A. Verlinda ¶ 9 (Aug. 7, 2017) ("Zarakas/Verlinda Sinclair-Tribune PTD Decl.") (attached as Exhibit E to DISH Sinclair-Tribune PTD").

market.[12] The difference in the retransmission fees paid to these larger versus smaller broadcast groups is highly statistically significant, not a difference of only a few percentage points.[13]

The evidence is not limited to showing that a large broadcaster charges more than a small one. Just as relevant to the National Cap, it also illustrates that broadcasters charge more after they become larger through a merger. DISH's experts analyzed what happened to the retransmission rates paid by the company after the ten large broadcast industry consolidations that took place during the last decade. They did this by comparing the first-year fee under the last pre-merger agreement of the target company with the first-year fee under the first post-merger agreement of the combined company, after adjusting the pre-merger target company fee based on average retransmission fee increases to reflect its older vintage. In all but one of these cases, after-acquired clauses operated to cause a rate hike immediately upon consummation.[14] But this rate hike was only the beginning. In all cases, the first agreement following consummation of these transactions ushered in rate increases over the target company's rates that outpaced industry wide price increases by percentages in the double or, in many cases, triple digits.[15]

Why is broadcaster size so significant in determining retransmission fees? There are at least two reasons. First, broadcast groups negotiate for retransmission consent fees across their entire footprint, demanding the same rate for a Top-4 station across all the broadcasters' markets,

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[12] DISH Sinclair-Tribune PTD at 25.

[13] Zarakas/Verlinda Sinclair-Tribune PTD Decl. ¶ 9; DISH Sinclair-Tribune PTD at 3-4.

[14] The only exception was where DISH had a contractual right to choose which of the combining companies' rates would govern post-transaction. No matter; for that transaction, too, the rates rose precipitously in the first agreement following consummation.

[15] Reply of DISH Network, L.L.C., MB Docket No. 17-179 at 24-25 (Aug. 29, 2017) ("DISH Sinclair-Tribune Reply"); *see* Reply Declaration of Janusz A. Ordover ¶ 19 (Aug. 29, 2017) (attached as Exhibit C to DISH Sinclair-Tribune Reply).

large and small, urban and rural. So smaller market stations piggyback on the rates demanded by larger market stations in a broadcast group's portfolio. Second, MVPDs like DISH can generally hold off above-normal price increases if threatened with a blackout by two separate broadcast groups (for example, Group 1 and Group 2) alone or even by each separately, but could not do so if threatened with a blackout of all stations at the same time, if those two separate groups consolidated. Faced with the loss of either Group 1's or Group 2's stations alone, DISH can take steps to avoid the loss of the other company's signal, and therefore be more able to resist significant price increases.[16] Moreover, DISH is more likely to manage the blackouts so as to limit subscriber loss even if it loses both companies' signals, but does so at different times, when each company's agreement expires.

Two national broadcast groups are partial substitutes for one another to a distributor such as DISH, as they are pathways to having a sufficient number of local stations nationwide to avoid excessive customer churn. The combination of the two groups would reduce these two pathways to one. The threat of simultaneously losing all the combined group's stations would make DISH more likely to capitulate to an unreasonable price increase.[17] As detailed by Professor Ordover:

> Thus, if DISH has been forced to a blackout by, say, Nexstar, and the Sinclair contract comes up for renewal during the blackout, DISH is more likely to agree to a high price demand by Sinclair. Conversely, if DISH has already secured from Nexstar the right to retransmit programming to all subscribers in its footprint, it will be in a better position to resist price demands by Sinclair.[18]

[16] DISH Sinclair-Tribune PTD at 27-28; *see* Ordonez Sinclair-Tribune PTD Decl. ¶ 7.

[17] DISH Sinclair-Tribune PTD at 28; *see* Ordonez Sinclair-Tribune PTD Decl. ¶ 8.

[18] Ordover Sinclair-Tribune PTD Decl. ¶ 20.

This is confirmed by hard data – DISH's behavior in retransmission negotiations. DISH has shown that, when faced with the blackout of all stations belonging to a broadcast group, it is likely to agree to pay above-market rates to other broadcasters whose agreements come up for renewal during that blackout threat. This is the case even though the two broadcast groups (the one under a blackout and the one up for renewal) have little or no geographic overlap. While two separate blackouts occurring at different times may be acceptable to DISH, a simultaneous blackout of the same aggregate number of stations is much harder to withstand.

MVPDs simply cannot afford to absorb further retransmission price increases, and would instead have to pass them on to their customers. DISH has made its name as the low-price distributor, and has fought the hardest of any MVPD to hold the line on its prices. But DISH is not immune to the principle that selling at a loss is not a viable business plan. DISH has thus been compelled to increase its prices for its America's Top 120, America's Top 120+, America's Top 200, and America's Top 250 packages a number of times.[19] An important factor compelling these price increases has remained consistent: the progressively increasing fee demands of the four networks and the large broadcast groups. Allowing broadcast groups to continue consolidating past the 39 percent National Cap threshold is likely to push prices even higher, without corresponding consumer benefit.

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[19] *See* James K. Willcox, *Your Cable Bill Is Going Up More Than You Think This Year*, Yahoo! Finance (Feb. 4, 2017), https://finance.yahoo.com/news/cable-bill-going-more-think-120003023.html; *see also* Daniel Frankel, *Dish Follows U-verse and DirecTV, Announces Rate Increases for 2016*, Fierce Cable (Dec. 18, 2015), http://www.fiercecable.com/cable/dish-follows-u-verse-and-directv-announces-rate-increases-for-2016.

B. The 39 percent National Cap remains necessary in the public interest to promote localism.

Localism is and remains the *sine qua non* of the public interest in the broadcast space: service to a local community is the currency paid by broadcasters for the privilege of exclusive access to the public airways.[20] But recent empirical research has shown that media consolidation has been bad for localism, as the larger broadcast conglomerates *do not* invest freed resources into local content and coverage.[21] Sinclair, for but one example, has consistently followed its broadcast acquisitions with slashing local news staffs, consolidating regional news production, and imposing "must-runs" and "Central Casting" programming from its corporate headquarters.[22] Allowing broadcast groups to continue consolidating past the 39 percent National Cap threshold will aggravate these harms to localism, without corresponding benefit.

The National Cap is all the more important for both competition and localism given the Commission's recent decision to eliminate the Eight-Voices Test and to modify the Top-Four

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[20] The broadcast industry often cites localism to justify any number of Commission regulations, from network non-duplication and syndicated exclusivity rules, to subsidizing broadcast licensees' repacking expenses after the incentive auction. *See* Broadcast Localism, *Report on Broadcast Localism and Notice of Proposed Rulemaking*, 23 FCC Rcd. 1324, 1327 ¶ 5 (2008).

[21] DISH Sinclair-Tribune PTD at 45 (citing Sandra Braman, *The Ideal v. the Real in Media Localism: Regulatory Implications*, 12 Comm. L. & Policy 231, 273 (2007) (citing Ronald Bishop and Ernest A. Hakanen, *In the Public Interest? The State of Local Television Programming Fifteen Years after Deregulation*, 26 J. of Comm. Inquiry 261 (2002); Steven T. Barry and Joel Waldfogel, *Do Mergers Increase Product Variety? Evidence from Radio Broadcasting*, 116 Q.J. Econ. 1009 (2001); Michael Ortner, *Serving a Different Master: The Decline of Diversity and the Public Interest in American Radio in the Wake of the Telecommunications Act of 1996*, 22 Hamline J. Pub. L. & Policy 139 (2000); Jill Howard, *Congress Errs in Deregulating Broadcast Ownership Caps: More Monopolies, Less Localism, Decreased Diversity and Violations of Equal Protection*, 5 Comm. Law Conspectus 269 (1997); Patricia Aufderheide, *Public Television & the Public Sphere,* 8 Critical Stud. Mass Comm. 168 (1991)).

[22] *Id.*; DISH Sinclair-Tribune Reply at 7.

Prohibition from a per se prohibition to a case-by-case review process.[23] As a general matter, elimination of these protections facilitates broadcaster consolidation, leading to larger broadcast groups and increasing the aforementioned harms to competition, localism, and consumers that come from such consolidation. The National Cap serves to somewhat blunt these harms by ensuring a broadcaster can only get so big; indeed, Congress' intent for National Cap, an intent that remains in force today, is to "prevent excessive consolidation in the broadcast market."[24]

II. ONLY CONGRESS HAS THE AUTHORITY TO MODIFY THE NATIONAL CAP

The Commission established the National Cap in 1985 as an "appropriate" and "advisable" "regulatory mechanism" supplementing its existing restrictions on the number of broadcast stations a person or group could own.[25] While the National Cap remains a part of the Commission's rules today,[26] Congress eliminated the Commission's authority to modify or eliminate it.

Congress has twice instructed the Commission to modify the National Cap and related rules since 1985. Congress's second intervention – the 2004 Consolidated Appropriations Act ("CAA") – not only required the Commission to modify the National Cap (this time reducing it

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[23] 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Order on Reconsideration and Notice of Proposed Rulemaking*, 32 FCC Rcd. 9802, 9803 ¶ 2 (2017).

[24] *UHF Discount Elimination Order* at 10224 ¶ 23.

[25] *1985 Order* at 89-90 ¶¶ 36-37. Congress has subsequently eliminated the restriction on the number of broadcast stations a group may own. *See* Telecommunications Act of 1996, Pub. L. No. 104-04, § 202(c)(1), 110 Stat. 56, 111 (1996) ("1996 Act"); *see also* Implementation of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996 (National Broadcast Television Ownership and Dual Network Operations), *Order*, 11 FCC Rcd. 12374, 12374-75 ¶¶ 2-3 (1996).

[26] 47 C.F.R. § 73.3555(e).

from 45 percent to 39 percent), it took the further step of removing from regular Commission review "any rules relating to the 39 percent national audience reach limitation."[27] This simultaneous reduction of the National Cap to an explicit 39 percent in statute, and removal of review of the National Cap from the purview of the Commission's regulatory evaluation of its media ownership rules, demonstrate a clear intention by Congress to strip the Commission of authority to modify the National Cap.

III. THE FCC SHOULD ELIMINATE THE UHF DISCOUNT

A. The technical justification for the UHF discount no longer applies.

The Commission adopted the UHF discount in 1985 to provide UHF stations a 50 percent discount, as compared to VHF stations, for purposes of calculating compliance with the National Cap.[28] As the *NPRM* recognizes, the Commission adopted this "UHF discount to reflect the fact that, in the analog television broadcasting era, UHF signals reached a smaller audience in comparison with VHF signals."[29] The Commission tailored the UHF discount to account for this "actual coverage limitation inherent in the UHF signal,"[30] thereby "mitigat[ing] the competitive disadvantage that [these technically inferior] UHF broadcast television stations suffered in comparison to VHF broadcast television stations" and causing viewership for purposes of the National Cap to more accurately reflect the actual amount of viewers that can access the signal of a broadcast group's stations.[31] But since the DTV transition, "UHF channels are equal, if not

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[27] Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) ("CAA"). The CAA additionally changes the Commission's regulatory review under section 202(h) of the 1996 Act from a biennial review to a quadrennial review.

[28] *NPRM* ¶ 1-2.

[29] *Id.* ¶ 2.

[30] *1985 Order* at 93 ¶ 44.

[31] *UHF Discount Elimination Order* at 10214 ¶ 2.

superior, to VHF channels for the digital transmission of television signals… [and] the UHF discount can no longer be supported on technical grounds."[32]

Unlike the National Cap, which continues to serve the Congressional purpose of "prevent[ing] excessive consolidation in the broadcast market"[33] by placing a broadly applicable limit on the number of viewers each television broadcast group may reach nationwide, the UHF discount no longer serves its intended purpose. To the contrary, the UHF discount now exacerbates the gap between the calculation of viewers for purposes of the National Cap, and the actual viewers of a broadcast station. In the digital age, the UHF signal reaches just as many viewers as its VHF counterpart. The Commission is under no obligation to maintain, and should remove, a rule that now affirmatively distorts actual station viewership.

B. The Commission has authority to eliminate the UHF discount.

Unlike the National Cap, which Congress both explicitly instructed the Commission to set at 39 percent and removed from the scope of the Commission's quadrennial regulatory review, Congress has never passed legislation addressing the UHF discount. Rather, the UHF discount is rolled into the Commission's definition of "national audience reach" (i.e., the "National Cap").[34] When Congress modified the National Cap through the 1996 Act and the CAA, it did so with knowledge of the Commission's UHF discount and an understanding that the UHF discount reflected actual station viewership in the pre-DTV transition landscape. Neither the 1996 Act, nor the CAA, contain any language suggesting the Commission is precluded from modifying the definition of "national audience reach" to ensure the definition maintains

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[32] *Id.*

[33] *Id.* at 10224 ¶ 23.

[34] 47 C.F.R. § 73.3555(e)(2)(i).

consistency with actual station viewership as technology changes. To the contrary, requiring the Commission to maintain a definition of "national audience reach" that no longer reflects reality serves to undercut the Commission's mandate that the Commission establish a national reach limitation of 39 percent because it would allow a broadcast group to reach double that amount of viewers – 78 percent – nationwide.[35]

IV. CONCLUSION

For the foregoing reasons, the Commission should not modify the National Cap, and should eliminate the UHF discount.

Respectfully Submitted,

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[35] *See UHF Discount Elimination Order* at 10235 ¶ 48. Such interpretations should be avoided. *See Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998) ("[A] statute should not be construed to produce an absurd result…. In deciding whether a result is absurd, we consider not only whether that result is contrary to common sense, but also whether it is inconsistent with the clear intentions of the statute's drafters—that is, whether the result is absurd when considered in the particular statutory context.").